

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN TELOH, PHILIP NEWTON and SIMON CROSLAND

Appeal 2007-0265
Application 09/988,853
Technology Center 2100

Decided: June 7, 2007

Before JOSEPH F. RUGGIERO, LANCE LEONARD BARRY and ALLEN R. MACDONALD, *Administrative Patent Judges*.

BARRY, *Administrative Patent Judge*.

I. STATEMENT OF THE CASE

A Patent Examiner rejected claims 1-51. The Appellants appeal therefrom under 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C. § 6(b).

A. INVENTION

The invention at issue on appeal replicates data in a computer network. Accelerated business practices and the globalization of the marketplace require business communications and operations to function around-the-clock. Corporate data repositories must be able to provide critical data regardless of interruptions caused by hardware failure, software failure, or geographical disaster. To achieve the necessary data continuity and resilience, businesses employ remote data repositories to back-up and store the critical data (Specification 1.)

For its part, the Appellants' invention replicates data from a local location and forwards the replicated data to a remote location. (*Id.* 6.) The invention uses the Transmission Control Protocol/Internet Protocol, i.e., TCP/IP, to forward the replicated data. (*Id.* 7.)

Claim 21 which further illustrates the invention, follows.

21. In a storage network, a method to create a replica of selected data in said storage network, said method comprising the steps of:

instructing a first data replication facility at a first electronic device in said storage network to track changes to one or more storage locations of a first storage medium that correspond to said selected data;

instructing said first data replication facility to generate said replica of said selected data based on said tracked changes to said one or more locations of said first storage medium;

placing said replica of said selected data in a data structure; and

forwarding said replica of said selected data in accordance with a communication protocol from said data structure to a second data replication facility at a second electronic device in said storage network for storage of said replica on a second storage medium by said second electronic device.

B. REJECTIONS

Claims 1-4, 6-10, 12-16, 18, 20-23, 25-29, 31-35, 37-41, 43-46 and 48-50 stand rejected under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,629,264 ("Sicola"). Claims 5, 11, 17, 19, 30 and 42 stand rejected under 35 U.S.C. § 103(a) as obvious over Sicola and U.S. Patent No. 6,629,264 ("Wahl"). Claims 24, 36, 47 and 51 stand rejected under § 103(a) as obvious over Sicola and U.S. Patent No. 6,209,002 ("Gagne").

II. GROUPING OF CLAIMS

"When multiple claims subject to the same ground of rejection are argued as a group by appellant, the Board may select a single claim from the group of claims that are argued together to decide the appeal with respect to the group of claims as to the ground of rejection on the basis of the selected claim alone. Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately." 37 C.F.R. § 41.37(c)(1)(vii) (2005).¹

¹ We cite to the version of the Code of Federal Regulations in effect at the time of the Appeal Brief.

Here, the Appellants argue claims 1-4, 6-10, 12-16, 18, 20-23, 25-29, 31-35, 37-41, 43-46 and 48-50, which are subject to the same ground of rejection, as a group. (Br. 12-15). We select claim 21 as the sole claim on which to decide the appeal of the group.

III. ISSUE

With the aforementioned representation in mind, rather than reiterate the positions of parties *in toto*, we focus on the issue therebetween. The Examiner makes the following findings.

As to claim 21, Sicola et al. teaches, in a storage network (see column 7, lines 1-11), a method to create a replica of selected data in the storage network (see column 1, lines 5-10), the method comprising the steps of: instructing a first data replication facility at a first electronic device in the storage network to track changes to one or more storage locations of a first storage medium that correspond to the selected data (see column 12, lines 17-34). . . .

(Answer 7.) Based on the premise that "[i]ndependent claims 1, 8, 13, 21, 33 and 45 all require the element of logically grouping two elements held by a storage device (regardless of the elements being structures, data structures, selected data, or one or more volumes) into a group, wherein said group is a single data set," (Appeal Br. 12-13), the Appellants argue, "Sicola fails to disclose this step of grouping two elements held by a storage device into a group." (*Id.* 13.) The Examiner "submits that independent claim[] 21 . . . make[s] no mention of grouping any kind." (Answer 17.) Therefore, the issue is whether the representative claim requires logically grouping two elements held by a storage device.

IV. PRINCIPLES OF LAW

"[T]he main purpose of the examination, to which every application is subjected, is to try to make sure that what each claim defines is patentable. [T]he name of the game is the claim. . . ." *In re Hiniker Co.*, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998) (quoting Giles S. Rich, *The Extent of the Protection and Interpretation of Claims -- American Perspectives*, 21 Int'l Rev. Indus. Prop. & Copyright L. 497, 499, 501 (1990)). "[T]he PTO gives claims their 'broadest reasonable interpretation.'" *In re Bigio*, 381 F.3d 1320, 1324, 72 USPQ2d 1209, 1211 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372, 54 USPQ2d 1664, 1668 (Fed. Cir. 2000)). "Moreover, limitations are not to be read into the claims from the specification." *In re Van Geuns*, 988 F.2d 1181, 1184, 26 USPQ2d 1057, 1059 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989)).

V. ANALYSIS

Here, contrary to the premise of the Appellants' argument, claim 21 does not require logically grouping two elements held by a storage device. Moreover, we agree with the Examiner that the representative claim makes "no mention of grouping [of] any kind." (Answer 17.) Because the premise is faulty, we are unpersuaded by the argument based thereon. Therefore, we affirm the rejection of claim 21 and of claims 1-4, 6-10, 12-16, 18, 20, 22, 23, 25-29, 31-35, 37-41, 43-46 and 48-50, which fall therewith.

Rather than arguing the rejections of claims 5, 11, 17, 19, 24, 30, 36, 42, 47 and 51 separately, the Appellants rely on their aforementioned argument. (Br. 15-17.) Unpersuaded by these arguments, we also affirm the rejections of these claims.

Assuming *arguendo* that the representative claim did require logically grouping two elements held by a storage device, we agree with the Examiner's finding that Sicola "instruct[s] a first data replication facility of a first electronic device in the storage network to logically associate a first data structure and a second data structure held by a locally accessible storage device, wherein the logical association defines a group (see abstract and column 20, lines 38-55. . . ." (*Id.* 4.) More specifically, "[a]s shown in FIG. 17, at step 1700 [of the reference], the logical unit members S1 through Sn (where 'n' can be any number) of an association set 'S' are established by a system user." (Col. 20, ll. 40-43.) Sicola explains that "[a]n association set is a group of logical units (a set of one more remote copy sets) on a local or remote pair of array controllers with attributes for logging and failover that are selectable by a system user." (Col. 19, ll. 58-61.) As noted by the Examiner, the reference explains that logical units are the "same as volumes, see column 8, line 53. . . ." (Answer 19.) Because the logical units of data that are grouped into association sets are on the same local array controllers or on the same remote array controllers, we find that Sicola logically groups two elements held by a storage device.

VI. ORDER

In summary, the rejection of claims 1-4, 6-10, 12-16, 18, 20-23, 25-29, 31-35, 37-41, 43-46, and 48-50 under § 102(e) is affirmed. The rejections of claims 5, 11, 17, 19, 24, 30, 36, 42, 47, and 51 under § 103(a) are also affirmed.

"Any arguments or authorities not included in the brief or a reply brief filed pursuant to [37 C.F.R.] § 41.41 will be refused consideration by the Board, unless good cause is shown." 37 C.F.R. § 41.37(c)(1)(vii). Accordingly, our affirmance is based only on the arguments made in the brief. Any arguments or authorities omitted therefrom are neither before us nor at issue but are considered waived. *Cf. In re Watts*, 354 F.3d 1362, 1367, 69 USPQ2d 1453, 1457 (Fed. Cir. 2004) ("[I]t is important that the applicant challenging a decision not be permitted to raise arguments on appeal that were not presented to the Board.")

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No time for taking any action connected with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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